

17 September 1975

MEMORANDUM FOR THE RECORD

SUBJECT: Further Action on NSSM 229

Several actions were taken at today's CIA meeting on NSSM 229:

a. The adequacy of the Executive order for compartmentation systems was considered. Subsequent to the meeting the recent letter to Chairman Pike on this subject and the OGC memorandum concerning authority for compartmentation systems (OGC 75-2850) were distributed. Subject to any further comment after review of these documents, it appeared that the provision in the Executive Order 11652 (section 9) is considered satisfactory.

b. The Federal Advisory Committee Act and S. 5, the so-called Sunshine Government Act, were discussed, and it was concluded that neither of these impact on the Agency and no proposals need be made to the Scowcroft group concerning them.

25X1 c. [] briefed the group generally on the data index system. He advised that the Agency data index system had been revised to meet the requirements of the Executive order. Costs in making the necessary adjustment were not heavy, but there were some costs and there continues to be some cost in operating it to meet the requirements of the Executive order. He stated further that he knows of no benefit to the Agency flowing from this modified data index system. I also mentioned that DOD had indicated that DOD could establish and maintain the required data index system only on the expenditure of millions of dollars. I did not know what the DOD has done on the matter. I also noted that, in my opinion, there is little value to ICRC in the data index. It was agreed that the Scowcroft group should address itself to the question of the purposes, value, costs, etc. of the data index system as required by the NSC directive implementing Executive Order 11652. At the ICRC meeting of 18 September, that Committee endorsed a proposal that a subcommittee of ICRC also consider this question.

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Associate General Counsel

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I. Definitions

Are the definitions of national security, Top Secret, Secret, and Confidential satisfactory? For example, does the Agency need to classify certain information and documents not because of the contents, but because of physical or other circumstances involving the handling, use, etc. of the document? Are there situations in which there are standard CIA documents which if known to be in the possession of government employees abroad would tend to identify those employees as CIAers? Section 1 of the Executive order is involved. Is section 4(c), concerning information furnished by foreign governments, a modification of the definitions of Top Secret, Secret and Confidential? Are there other provisions of the order or the NSC directive which should be considered?

II. The Glomar-Type Reply

A number of requests to CIA under the Freedom of Information Act have resulted in responses now referred to, at least within the Agency, as "Glomar" answers. The essence of the answer is to refrain from even determining whether documents responsive to the request exist and to answer that whether or not any such documents exist or there is Agency interest in or association with the subject of the inquiry is classified information. The reply therefore states that it is intended to neither deny nor confirm CIA association with the subject of the request. This answer has been used in responses to requests for documents relating to the Glomar and to a number of others. In fact, a response by CIA to a requester concerning CIA association with the publication of certain books is now on appeal to ICRC. Is the Executive order adequate for this type of response? Can it be strengthened or improved? Should this type of response be discontinued? Is there CIA regulation or directive in being which classifies such information? See the amendment to the CIA regulation under the Freedom of Information Act and Executive order designed to support the Glomar answer. The amendment is in 1900.35b of the regulation.

III. Pending Legislation Pertinent to NSSM 229

IV. Exemption and Declassification Standards (section 5 of the order)

Are these satisfactory having in mind that under FOI these provisions apply not only to 10-year old documents, but also to all others?

V. Authority to Classify (section 2 of the order) and "Derivative" Authority

Does CIA classify documents and information only on a determination by an individual designated under section 2? Do we in fact use a "derivative" authority approach for changes if any are in order? Is the order adequate in these areas?

VI. Veto and Supervision Authority of ICRC, Over CIA and Intelligence Community

Is this rational, useful, realistic, wise?

VII. Adequacy of CIA Implementation of Executive Order 11652

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ANALYSIS OF THE FEDERAL ADVISORY COMMITTEE ACT
P.L. 92-463

1. Coverage of the Act

The Federal Advisory Committee Act establishes procedures relating to the creation, supervision, operation, and review of advisory committees. Advisory committees are defined as any committee, board, commission, council, conference, panel, task force, or other similar group or subcommittee or subgroup thereof which is (1) established by statute, (2) established or utilized by the President, or (3) established or utilized by more than one agency in the interest of obtaining advice or recommendations for the President or agencies. Excepted from the definition of advisory committees are committees which are composed fully of full-time employees or officers of the Federal government.

2. Applicability

Section 4(b)(1) specifically states that nothing in the Act shall be construed to apply to any advisory committee established or utilized by the Central Intelligence Agency.

3. Administrative Impact

Section 8(b) requires that the head of the agency appoint an advisory committee management officer only if the agency has an advisory committee. It might be wise to establish such a position, notwithstanding the absence of any committees, to centralize decisionmaking and resolve questions as to the applicability of the Act.

4. Operational Impact

None.

5. Fiscal Impact

None.

6. Impact on NSSM 229

The various committees of which the Agency is a part (e.g., NSC, USIB, ICRC) do not have blanket exemptions and must rely upon the "full-time employee" exemption or none at all. If not exempt from the Act, the Agency must establish uniform administrative guidelines, maintain systematic information on the committees, and comply with the notice and reporting requirements of sections 10, 11, and 12.

ANALYSIS OF S. 5 - GOVERNMENT IN THE SUNSHINE ACT

1. Coverage of the Act

The Act, as reported, requires that congressional committee meetings or agency collegial bodies be open to the public except to the extent provided in specific exemptions in the Act. In addition, notice, recording, and disclosure requirements are prescribed.

2. Applicability

Under section 201(a), coverage of the Act extends to all agencies where a collegial body, consisting of two or more employees, at least two of whom are appointed by the President with the advice and consent of the Senate, is authorized to take action on behalf of the Agency. The Committee on Government Operations of the United States Senate in their section-by-section analysis on this particular provision stated that:

The term "collegial body comprising the agency" does not refer to a single individual who heads an agency with the assistance of a staff, nor the staff of an agency. The term is limited solely to the two or more individuals serving on the commission or board which heads the agency (Report No. 94-354, p. 15).

Section 201(a) covers all multiheaded agencies ... (Report No. 95-354, p. 15).

This Act does not, according to the congressional intent, apply to single-headed agencies such as the CIA. It is unclear as to whether the Act applies to USIB, NSC, ICRC, and the 40 Committee. According to the Senate report, any body subject to the Federal Advisory Committee Act would not be governed by S. 5. Though the applicability of the Act is extremely limited, if not non-existent, a short discussion is included below for informational purposes.

3. Administrative Impact

- (a) If the Agency qualifies under section 201(a), then it must, under the provisions of 201(d), make a public announcement at least one week prior to the meeting of the date, place, and subject matter of the meeting, whether open or closed to the public, and the name and

phone number of the official designated to respond to requests about the meeting. Notice of such an announcement is required to be submitted for publication in the Federal Register.

- (b) Section 201(f) will require a qualifying agency to promulgate regulations implementing the Act within 180 days.
- (c) Section 201(g) provides for a judicial remedy to enforce the requirements of this Act and other appropriate relief. Included is a ten-day period to provide an agency with the opportunity to correct any violation of the Act. Expeditionary handling of judicial actions under this section is provided for with the defendant required to answer within 20 days after service of the complaint.
- (d) Section 201(j) subjects the qualifying agency to the requirement of annually reporting to Congress regarding its compliance with the Act, to include tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and the description of any litigation brought against the agency in regard to this section.

4. Operational Impact

Section 201(b) provides for the following exemptions from open meetings:

- (a) 201(b) provides ten specific exemptions for closing a meeting to the public and a procedure by which such action is accomplished. Subparagraph 201(b)(1) provides that a meeting may be closed which would disclose information specifically required to be kept secret by an Executive order in the interest of national security or foreign policy and which is properly classified pursuant to such Executive order. Subparagraph 201(b)(2) protects information related solely to the agency's own internal personnel, rules, and practices.
- (b) Subsection (e) requires an agency to keep a transcript or electronic recording of the meetings closed to the public and subsection (g) allows a court to examine the record or other information before ordering its release, or opening a meeting. In discussing this exemption, the Senate Committee Report indicated that if an

agency subject to this section receives information properly classified by another agency and public disclosure of the information is prohibited, the meeting must be closed. The agency would have no discretion, for the law provides that in such a case, the agency must accept on its face the classification placed on the material by the originating agency.

5. Fiscal Impact

None.

TEXT OF S. 5 AS REPORTED

A BILL TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act."

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information, while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

SEC. 3. DEFINITIONS.—For purposes of this Act the term, "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

TITLE I—CONGRESSIONAL PROCEDURES

SEC. 101. SENATE COMMITTEE MEETINGS.—(a) The Legislative Reorganization Act of 1946 is amended—

- (1) by striking out the first sentence of section 133(b);
- (2) by adding after section 133B the following:

"OPEN SENATE COMMITTEE MEETINGS

"Sec. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings."

(b) Paragraph 7(b) of Rule XXV of the Standing Rules of the Senate is repealed.

(c) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133B the following:

"133C. Open Senate committee meetings."

SEC. 102. House of Representatives committee meetings.—Clause 2 (g) (1) of Rule XI of the Rules of the House of Representatives is amended to read as follows:

"(g) (1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings."

SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate or the House of Representatives in open session determine, by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public."

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101(c) of this Act, the following:

"133D. Open conference committee meetings."

SEC. 104. (a) JOINT COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133D, as added by section 102(a) of this Act, the following new section:

"OPEN JOINT COMMITTEE MEETINGS

"SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings."

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133D, as added by section 103(b) of this Act, the following:

"133E. Open joint committee meetings."

SEC. 105. EXERCISE OF RULEMAKING POWERS.—The provisions of this title are enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate. Except as provided in subsection (b), all meetings of such collegial body, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. For purposes of this section, a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

(b) Except where the agency finds that the public interest requires otherwise, (1) subsection (a) shall not apply to any agency meeting, or any portion of an agency meeting, or to any meeting, or any portion of a meeting, of a subdivision thereof authorized to take action on behalf of the agency, and, (2) the requirements of subsections (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency, or the subdivision thereof conducting the meeting, properly determines that such portion or portions of its meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) relate solely to the agency's own internal personnel rules and practices;

(3) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal

privacy, (D) disclose the identity of a confidential source, (E) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

(6) disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates;

(7) disclose information which must be withheld from the public in order to avoid premature disclosure of an action or a proposed action by—

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to serious financial speculation in currencies, securities, or commodities, or (ii) seriously endanger the stability of any financial institution;

(B) any agency where such disclosure would seriously frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This paragraph shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

(10) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

(c)(1) Action under subsection (b) shall be taken only when a majority of the entire membership of the agency, or of the subdivision thereof authorized to conduct the meeting on behalf of the agency, votes to take such action. A separate vote of the agency members, or the members of a subdivision thereof, shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (b), or with respect to any information which is proposed to be withheld under subsection

(b). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Whenever any person whose interests may be directly affected by a meeting requests that the agency close a portion or portions of the meeting to the public for any of the reasons referred to in paragraphs (3), (4), or (5) of subsection (b), the agency shall vote whether to close such meeting, upon request of any one of its members. Within one day of any vote taken pursuant to this paragraph the agency shall make publicly available a written copy of such vote.

(2) If a meeting or portion thereof is closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) of this subsection, make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting, and their affiliation.

(3) Any agency, a majority of whose meetings will properly be closed to the public, in whole or in part, pursuant to paragraphs (6), (7) (A), (8), or (9) of subsection (b), or any combination thereof, may provide by regulation for the closing of such meetings, or portions of such meetings, so long as a majority of the members of the agency, or of the subdivision thereof conducting the meeting, votes at the beginning of such meeting, or portion thereof, to close the meeting, and a copy of such vote is made available to the public. The provisions of this subsection, and subsection (d), shall not apply to any meeting to which such regulations apply: Provided, That the agency shall, except to the extent that the provision of subsection (b) may apply, provide the public with public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity.

(d) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency, or of the members of the subdivision thereof conducting the meeting, determines by a vote that agency business requires that such meetings be called at an earlier date, in which case, the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable opportunity. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph if, (1) a majority of the entire membership of the agency, or of the subdivision thereof conducting the meeting, determines by a vote that agency business so requires, and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change at the earliest practicable opportunity. Immediately following the public announcement required by this par-

agraph, notice of such announcement shall also be submitted for publication in the Federal Register.

(e) A complete transcript or electronic recording adequate to fully record the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (9) of subsection (b). The agency shall make promptly available to the public, in a place easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, where no significant portion of such discussion or testimony contains any information specified in paragraphs (1) through (10) of subsection (b). Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(f) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment of this Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (a) through (c) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (a) through (e) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States have jurisdiction to enforce the requirement of subsections (a) through (e) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Before bringing such action, the plaintiff shall first notify the agency of his intent to do so, and allow the agency a reasonable period of time, not to exceed ten days, to correct any violation of this section, except that such reasonable period of time shall not be held to exceed two working days where notification of such violation is made prior to a meeting which the agency

has voted to close. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public the transcript or electronic recording of any portion of a meeting improperly closed to the public. Except to the extent provided in subsection (h) of this section, nothing in this section confers jurisdiction on any district court to set aside or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(h) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section, and afford any such relief as it deems appropriate.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (f), (g), or (h) of this section. Costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section, or against the plaintiff where the court finds that the suit was initiated by the plaintiff for frivolous or dilatory purposes. In the case of apportionment of costs against an agency, the costs may be assessed by the court against the United States.

(j) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.

Sec. 202. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably

be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of this subsection, shall place on the public record of the proceeding:

"(A) written communications transmitted in violation of this subsection;

"(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

"(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

"(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge."

(b) The second sentence of section 554(d) of title 5, United States Code, is amended to read as follows: "Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."

(c) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given."

(d) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur."

SEC. 203. (a) Except as specifically provided by section 201, nothing in section 201 confers any additional rights on any person, or limits

the present rights of any such person, to inspect or copy, under section 552 of title 5, United States Code, any documents or other written material within the possession of any agency. In the case of any request made pursuant to section 552 of title 5, United States Code, to copy or inspect the transcripts or electronic recordings described in section 201(e), the provisions of this Act shall govern whether such transcript or electronic recordings shall be made available in accordance with such request. The requirements of chapter 33, of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in section 201(e). This title does not authorize any information to be withheld from Congress.

(b) Nothing in section 201 authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to that individual under section 552a of title 5, United States Code.

Sec. 204. The provisions of this title shall become effective one hundred and eighty days after the date on which this Act is enacted, except that the provisions of section 201 requiring the issuance of regulations to implement such section shall become effective upon enactment.

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